

AGRICULTURAL LABOR RELATIONS BOARD
2001 CASE DIGEST SUPPLEMENT (VOL. 27)
REVISED

(Please note that this revised supplement omits entries for Turco Desert Co., Inc., 27 ALRB No. 4, as that decision was annulled by the 4th District Court of Appeal on July 5, 2002, in an unpublished decision.)

- 312.05 Confidential employees are only those who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. RD's conclusions that employees at issue do not participate with any management person in the resolution of employee grievances or complaints and do not perform work that involves labor relations matters are consistent with this test.
COCOPAH NURSERIES, INC., 27 ALRB No. 3
- 312.05 Regular access to confidential files is insufficient to establish confidential status. However, an employee who has regular access to documents regarding management's positions in collective bargaining and labor relations matters before they are revealed to the union or affected employees may be considered confidential. (*E & L Transport Company* (1998) 327 NLRB 408; *Associated Day Care Services* (1984) 269 NLRB 178.)
COCOPAH NURSERIES, INC., 27 ALRB No. 3
- 312.11 An individual is eligible to vote if he or she would have worked during the eligibility period but for an absence due to illness and there is a reasonable expectation of returning to work. (*Rod McLellan Co.* (1977) 3 ALRB No. 6; *Valdora Produce Co.* (1977) 3 ALRB No. 8.) In deciding eligibility, the Board must consider such factors as the employee's history of employment, continued payments into insurance funds, contributions to pension or other benefit programs, and any other relevant evidence which bears upon the question of whether or not there was a current job or position actually held by the employee during the eligibility period. Therefore, further investigation is necessary before ruling on the challenged ballot of an employee who was "disabled" during the eligibility period.
COCOPAH NURSERIES, INC., 27 ALRB No. 3

- 314.07 Though RD was unable to obtain additional evidence of identity from employee who failed to bring identification on the day of the election, where names and signatures match on W-4 form and declaration signed on day of election, and party who challenged voter assents to reliance on matching signatures, it is appropriate to open and count the ballot.
COCOPAH NURSERIES, INC., 27 ALRB No. 3
- 323.09 Board found without merit General Counsel's exception to ALJ decision based on failure to provide Mixtec or Zapotec translator to witness whose Spanish was marginal. General Counsel proceeded with the available Spanish translator at the hearing and did not adequately create a record regarding the translation issue. Furthermore, the Board reviewed the entire record de novo and found it to be sufficient to reach its decision.
CIENIGA FARMS, INC., 27 ALRB No. 5
- 325.04 Exceptions to RD challenged ballot report must be rejected where the party filing the exceptions fails to provide material facts that contradict the RD's findings. (*Sequoia Orange Co.* (1987) 13 ALRB No. 9; *Miranda Mushroom Farm, Inc.* (1980) 6 ALRB No. 22.) The Board is entitled to rely on the report of a Regional Director where the parties fail to raise a material factual dispute that would warrant further investigation or hearing. (*Sam Andrews' Sons* (1976) 2 ALRB No.28.)
COCOPAH NURSERIES, INC., 27 ALRB No. 3
- 400.01 Section 1153(a) of the Act was violated by employer who singled out a group of workers immediately after they engaged in protected concerted activity, who asked them to leave and return at some unspecified time when she would know the piece rate, and who then fired them when they entered the field and attempted to work by the hour with the rest of the crew.
CIENIGA FARMS, INC., 27 ALRB No. 5
- 414.04 Employees who refused to work pending clarification from the owner of their rate of pay and who then met in a group with the owner to discuss the rate of pay were engaged in protected concerted activity.
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CIENIGA FARMS, INC., 27 ALRB No. 5
- 414.04 Board found that General Counsel proved by a preponderance of the evidence that the employer knew that the employees had engaged in protected concerted activity and discharged them for that reason. General Counsel's prima facie case was supported by both direct and circumstantial evidence.
CIENIGA FARMS, INC., 27 ALRB No. 5
- 417.01 Section 1153(a) of the Act was violated by employer who singled out a group of workers immediately after they engaged in protected concerted activity, who asked them to leave and return at some unspecified time when she would know the piece rate, and who then fired them when they entered the field and attempted to work by the hour with the rest of the crew.
CIENIGA FARMS, INC., 27 ALRB No. 5
- 420.06 While peaceful work stoppage was protected, those who later rushed the fields and interfered with other employees' right to refrain from joining the work stoppage lost the protection of the ALRA.
COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
- 420.06 Where it was found that protesters rushed the fields and engaged in unprotected conduct by interfering with the rights of nonstriking workers, it was unnecessary to proceed to determine whether their individual actions constituted "serious strike misconduct."
COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228

- 420.06 Strike misconduct need not consist of physical acts, but may consist of an expression of hostility that may tend to coerce or intimidate nonstriking employees; the misconduct need not be directed at nonstriking employees, as threatening customers and company officials and striking their vehicles has been deemed misconduct even where no actual damage resulted, as has acts of vandalism or sabotage directed against the employer; actions that promote or encourage misconduct by other strikers may also justify discharge. COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
- 420.06 The present standard for strike misconduct is that adopted by the NLRB in *Clear Pine Mouldings, Inc.* (1984) 268 NLRB 1044, i.e., that strike misconduct is “serious” (thereby justifying dismissal or denial of reinstatement) if it reasonably tends to coerce or intimidate nonstriking workers. COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
- 420.06 Once the G.C. has established that a striker was denied reinstatement for conduct related to a strike, the burden shifts to the employer to establish that it had an honest belief that the striker engaged in strike misconduct. (The employer’s determination not to reinstate a striker must be based on evidence that the striker personally engaged in strike misconduct.) If the employer meets its burden, the G.C. then has the burden of establishing that the striker did not in fact engage in the alleged misconduct or that it was not sufficiently serious to remove the protection of the Act. COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
- 423.01 Employees who refused to work pending clarification from the owner of their rate of pay and who then met in a group with the owner to discuss the rate of pay were engaged in protected concerted activity. CIENIGA FARMS, INC., 27 ALRB No. 5
- 423.01 Where it was found that protesters rushed the fields and engaged in unprotected conduct by interfering with the rights of nonstriking workers, it was unnecessary to proceed to determine whether their individual actions constituted “serious strike misconduct.” COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228

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COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
- 423.01 Concerted activity is protected if it meets four conditions: (1) there must be a work-related complaint or grievance; (2) a specific remedy or result must be sought through such activity; (3) the concerted activity must further some group interest; and (4) the activity should not be unlawful or otherwise improper (e.g., violent, in breach of contract or indefensibly disloyal). (Citing *Nash-DeCamp Co. v. ALRB* (1983) 146 Cal.App.3d 92, 104; accord, *Bertuccio v. ALRB* (1988) 202 Cal.App.3d 1369, 1404.)
COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
- 423.01 That protesters made unreasonable demands, such as the removal of UFW supporters from the fields, did not remove entire protest from the protection of the ALRA.
COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
- 423.01 As long as an employer does not discharge an employee for engaging in protected activities, he may fire him for any reason, just or not, reasonable or not, or for no cause or reason at all.
COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
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COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
- 423.11 Board credited the General Counsel’s witnesses who testified, contrary to the employer’s testimony that they voluntarily quit, that they were fired when they entered the field and attempted to work along with the rest of the crew. The Board was especially impressed with the recollection and consistency of detail among these witnesses.
CIENIGA FARMS, INC., 27 ALRB No. 5

- 424.03 That protesters made unreasonable demands, such as the removal of UFW supporters from the fields, did not remove entire protest from the protection of the ALRA.
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- 424.04 While peaceful work stoppage was protected, those who later rushed the fields and interfered with other employees' right to refrain from joining the work stoppage lost the protection of the ALRA.
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- 424.04 Where it was found that protesters rushed the fields and engaged in unprotected conduct by interfering with the rights of nonstriking workers, it was unnecessary to proceed to determine whether their individual actions constituted "serious strike misconduct."
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- 424.04 Once the G.C. has established that a striker was denied reinstatement for conduct related to a strike, the burden shifts to the employer to establish that it had an honest belief that the striker engaged in strike misconduct. (The employer's determination not to reinstate a striker must be based on evidence that the striker personally engaged in strike misconduct.) If the employer meets its burden, the G.C. then has the burden of establishing that the striker did not in fact engage in the alleged misconduct or that it was not sufficiently serious to remove the protection of the Act.
COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228

- 424.04 Strike misconduct need not consist of physical acts, but may consist of an expression of hostility that may tend to coerce or intimidate nonstriking employees; the misconduct need not be directed at nonstriking employees, as threatening customers and company officials and striking their vehicles has been deemed misconduct even where no actual damage resulted, as has acts of vandalism or sabotage directed against the employer; actions that promote or encourage misconduct by other strikers may also justify discharge. COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114
- 424.04 Once the G.C. has established that a striker was denied reinstatement for conduct related to a strike, the burden shifts to the employer to establish that it had an honest belief that the striker engaged in strike misconduct. (The employer's determination not to reinstate a striker must be based on evidence that the striker personally engaged in strike misconduct.) If the employer meets its burden, the G.C. then has the burden of establishing that the striker did not in fact engage in the alleged misconduct or that it was not sufficiently serious to remove the protection of the Act. COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
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- 432.02 Employer's willingness to discuss changes in working conditions with the union during the course of its technical refusal to bargain, which was the employer's legal duty, and the employer's decision, after 10 months, not to pursue judicial review, were not probative of the employer's good faith at the time it technically refused to bargain with the union. THE HESS COLLECTION WINERY, 27 ALRB No. 2

- 432.02 Election objections that would require that the Board disregard mandatory provisions of the ALRA with regard to bargaining unit designations, that lack the required declaratory support, that are based on misstatements of applicable legal standards, and that completely lack legal support to the point of being frivolous, do not constitute a reasonable good faith basis for seeking judicial review of a certification. Therefore, the bargaining makewhole remedy is appropriate.
THE HESS COLLECTION WINERY, 27 ALRB No. 2
- 432.02 Ten month delay occasioned by employer's aborted technical refusal to bargain is not without consequence. Any delay in bargaining due to a technical refusal to bargain that is not undertaken in reasonable good faith undermines the Act and interferes with employee free choice at a critical period and postpones the union's ability to negotiate a contract on behalf of the employees in the bargaining unit.
THE HESS COLLECTION WINERY, 27 ALRB No. 2
- 455.02 Board found without merit General Counsel's exception to ALJ decision based on failure to provide Mixtec or Zapotec translator to witness whose Spanish was marginal. General Counsel proceeded with the available Spanish translator at the hearing and did not adequately create a record regarding the translation issue. Furthermore, the Board reviewed the entire record de novo and found it to be sufficient to reach its decision.
CIENIGA FARMS, INC., 27 ALRB No. 5
- 455.03 Board disagreed with ALJ who did not credit the General Counsel's witnesses' testimony that they were fired. The ALJ's credibility determinations were not demeanor based, but rather based upon what he perceived to be the implausibility and inconsistency of the witnesses' testimony. Board reviewed the record de novo and found this testimony to be both plausible and consistent.
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- 455.03 Board credited the General Counsel's witnesses who testified, contrary to the employer's testimony that they voluntarily quit, that they were fired when they entered the field and attempted to work along with the rest of the crew. The Board was especially impressed with the recollection and consistency of detail among these witnesses.
CIENIGA FARMS, INC., 27 ALRB No. 5

- 457.13 Motions to Close (new section)
Where, in the judgment of the regional director, there is no reasonable likelihood that further efforts will result in full or additional compliance with the Board's order in a fully adjudicated case, the regional director may file a motion to close the case. Motions to close such cases shall be filed with the Board and served on the parties in accordance with Title 8, California Code of Regulations, sections 20160 and 20166. Parties shall have thirty (30) days from the date of service to file a response to the motion to close. A reply, if any, shall be filed within ten (10) days after service of the response. The motion shall contain, inter alia, the case name and number(s), the number(s) of the underlying Board decision(s), a brief summary of the case and the remedies ordered by the Board, the date the case was released for compliance, a detailed description of the steps taken to achieve full compliance, factors preventing full compliance, and the reasons why there is no reasonable likelihood that further efforts will be successful.
JOHN V. BORCHARD, ET AL., 27 ALRB No. 1
- 460.02 The present standard for strike misconduct is that adopted by the NLRB in *Clear Pine Mouldings, Inc.* (1984) 268 NLRB 1044, i.e., that strike misconduct is "serious" (thereby justifying dismissal or denial of reinstatement) if it reasonably tends to coerce or intimidate nonstriking workers.
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- 460.02 Strike misconduct need not consist of physical acts, but may consist of an expression of hostility that may tend to coerce or intimidate nonstriking employees; the misconduct need not be directed at nonstriking employees, as threatening customers and company officials and striking their vehicles has been deemed misconduct even where no actual damage resulted, as has acts of vandalism or sabotage directed against the employer; actions that promote or encourage misconduct by other strikers may also justify discharge.
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COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
- 460.02 Where strike misconduct is at issue, acts discovered after a discharge are nonetheless relevant to establishing entitlement to reinstatement and backpay.
COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
- 460.05 Where, in the judgment of the regional director, there is no reasonable likelihood that further efforts will result in full or additional compliance with the Board's order in a fully adjudicated case, the regional director may file a motion to close the case. Motions to close such cases shall be filed with the Board and served on the parties in accordance with Title 8, California Code of Regulations, sections 20160 and 20166. Parties shall have thirty (30) days from the date of service to file a response to the motion to close. A reply, if any, shall be filed within ten (10) days after service of the response. The motion shall contain, inter alia, the case name and number(s), the number(s) of the underlying Board decision(s), a brief summary of the case and the remedies ordered by the Board, the date the case was released for compliance, a detailed description of the steps taken to achieve full compliance, factors preventing full compliance, and the reasons why there is no reasonable likelihood that further efforts will be successful.
JOHN V. BORCHARD, ET AL., 27 ALRB No. 1
- 463.03 Employer's willingness to discuss changes in working conditions with the union during the course of its technical refusal to bargain, which was the employer's legal duty, and the employer's decision, after 10 months, not to pursue judicial review, were not probative of the employer's good faith at the time it technically refused to bargain with the union.
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- 463.03 Election objections that would require that the Board disregard mandatory provisions of the ALRA with regard to bargaining unit designations, that lack the required declaratory support, that are based on misstatements of applicable legal standards, and that completely lack legal support to the point of being frivolous, do not constitute a reasonable good faith basis for seeking judicial review of a certification. Therefore, the bargaining makewhole remedy is appropriate.
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- 463.03 Ten month delay occasioned by employer's aborted technical refusal to bargain is not without consequence. Any delay in bargaining due to a technical refusal to bargain that is not undertaken in reasonable good faith undermines the Act and interferes with employee free choice at a critical period and postpones the union's ability to negotiate a contract on behalf of the employees in the bargaining unit.
THE HESS COLLECTION WINERY, 27 ALRB No. 2
- 464.02 The makewhole period in a technical refusal to bargain case shall begin on the date the employer receives the union's request to bargain or, in the case of a written request where the date of receipt is unknown, three working days after the mailing of the request. The makewhole period ends on the date that good faith bargaining commences.
THE HESS COLLECTION WINERY, 27 ALRB No. 2
- 502.12 Where the Board's decision rests on "erroneous legal foundations," the matter should be returned to the Board for reconsideration of its decision. (Citing *Vessey & Company, Inc.* (1989) 210 Cal.App.3d 629, 643.)
COASTAL BERRY CO. v. ALRB (2001) 94 Cal.App.4th 1, 114 Cal.Rptr.2d 228
- 600.03 Board found that General Counsel proved by a preponderance of the evidence that the employer knew that the employees had engaged in protected concerted activity and discharged them for that reason. General Counsel's prima facie case was supported by both direct and circumstantial evidence.
CIENIGA FARMS, INC., 27 ALRB No. 5

- 600.14 Board disagreed with ALJ who did not credit the General Counsel's witnesses' testimony that they were fired. The ALJ's credibility determinations were not demeanor based, but rather based upon what he perceived to be the implausibility and inconsistency of the witnesses' testimony. Board reviewed the record de novo and found this testimony to be both plausible and consistent.
CIENIGA FARMS, INC., 27 ALRB No. 5
- 600.20 Even if the parties had stipulated to the beginning and ending dates of the bargaining makewhole period, the Board would not be bound to accept those dates. The Board has the ultimate authority to determine the appropriate remedy in a given case, and to draw its own legal conclusions, notwithstanding the relief requested by the General Counsel or other parties. (*Harry Carian Sales v. ALRB* (1985) 39 Cal.3d 209; *D. Papagni Fruit Co.* (1985) 11 ALRB No. 38.)
THE HESS COLLECTION WINERY, 27 ALRB No. 2